STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

IN RE: INTRASTATE ACCESS SERVICE CHARGES [199 IAC 22.14(2)"d"(1)]	DOCKET NO. RMU-03-11

ORDER ADOPTING AMENDMENTS

(Issued March 18, 2004)

Pursuant to Iowa Code §§ 17A.4, 474.5, 476.1, 476.2, and 476.4 (2003), the Utilities Board (Board) is adopting the amendments attached hereto and incorporated herein by reference. On July 18, 2003, the Board issued an order in Docket No. RMU-03-11, In re: Intrastate Access Service Charges [199 IAC 22.14(2)"d"(1)], "Order Commencing Rule Making." The rule making proposed to amend 199 IAC 22.14(2)"d"(1), the Board's rules related to intrastate access charges. The "Notice of Intended Action" was published in IAB Vol. XXVI, No.3 (8/6/03) p. 203, as ARC 2680B.

Written comments were filed by Qwest Corporation (Qwest); AT&T Communications of the Midwest, Inc. (AT&T); Sprint Communications Company L.P. (Sprint); Rural Iowa Independent Telephone Association (RIITA); a group of 17 competitive local exchange carriers (CLEC Group) (Cedar Communications, LLC; Coon Creek Telecommunications; Farmers and Businessmen's Telephone Company; FiberComm, LLC; Farmers Mutual Cooperative Telephone Company-Harlan; Forest City Telecom, Inc.; Goldfield Access Network; Heart of Iowa

Communications Cooperative; Huxley Communications Cooperative; Independent Networks, LLC; Lost Nation-Elwood Telephone Company; Louisa Communications, LLC; OmniTel Communications, Inc.; Guthrie Telecommunications Network, Inc.; Partner Communications Cooperative; Walnut Telephone Company; and BTC, Inc.); the Consumer Advocate Division of the Department of Justice (Consumer Advocate); and MCI WorldCom, Inc. (MCI).

An oral presentation was held on September 23, 2003. Pursuant to Board requests, MCI, Qwest, and AT&T filed supplemental comments. AT&T also filed a supplemental statement of position and additional comments after the supplemental comments. The CLEC Group filed two sets of additional comments.

The Board proposed amendments to subparagraph 22.14(2)"d"(1) in two areas. First, the Board proposed to reflect the current application of the Carrier Common Line charge (CCLC) by rate-regulated incumbent local exchange carriers (ILECs). Second, the Board proposed to require competitive local exchange carriers (CLECs) that choose to concur with the Iowa Telecommunications Association (ITA) Access Service Tariff No. 1 and that offer service in exchanges where the ILEC access rate is lower than the ITA access tariff rate to remove the three-cent CCLC rate element from their access tariffs.

This second amendment is based on the Board's October 25, 2001, decision In re: FiberComm L.L.C., et al., v. AT&T Corp., Docket No. FCU-00-3. In that case the Board found that CLECs had market power with respect to intrastate access services and that the rates being charged by the CLECs who were parties to the case

were not just and reasonable. As a result, the Board ordered the CLECs that were parties to the case to file new access tariffs reflecting the removal of the CCLC. The Board has incorporated the decision in the FiberComm case in numbered paragraph 22.14(2)"d"(1)"2" so that all CLECs that adopt the ITA access tariff No. 1 will be subject to the same requirement.

22.14(2)"d"(1)"1"

There were no significant comments opposing the proposed amendment to subparagraph 22.14(2)"d"(1)"1" to update the rules to reflect the current treatment of the CCLC by rate-regulated ILECs. The Board will adopt subparagraph 22.14(2)"d"(1)"1" as proposed.

22.14(2)"d"(1)"2"

Several participants raised concerns about the proposed amendment to eliminate the CCLC from CLEC tariffs that concur in the ITA access tariff. Some were concerned about a potential issue related to the ability of a CLEC to avoid eliminating the CCLC. This would occur if the CLEC did not concur in the ITA tariff and instead filed its own access tariff.

Many of the comments asserted that the Board's rules should apply to all CLECs, not just those that choose to concur in the ITA access tariff. AT&T and Qwest suggest revisions to the proposed amendments that would require all CLECs to remove the CCLC in any exchange where the ILEC's access rates are lower than the ITA tariff rates. MCI suggests a revision that would require all CLECs in exchanges where the ILEC's access rates are lower than the CLEC's.

The CLEC Group opposes the proposed amendment to adopt the Board's decision in the FiberComm case. The CLEC Group argues that the Board has no jurisdiction over the intrastate access charges of CLECs and the analysis of the Board's FiberComm order does not provide a basis for removal of the three-cent CCLC.

The CLEC Group argues that prior to the Board's October 18, 2002 declaratory order, In re: Interstate 35 Telephone Company, d/b/a Interstate Communications and Southwest Telephone Exchange Inc., d/b/a Interstate Communications, Docket No. DRU-02-4, it had been recognized that Iowa Code § 476.11 was applicable to all local exchange carriers and the statute applied to access charges. Under this interpretation, the Board had jurisdiction to consider the reasonableness of access rates. However, the CLEC Group contends that there was disagreement among the parties in the FiberComm case regarding the Board's authority over non-rate regulated local exchange carriers under Iowa Code § 476.1 and the authority over access charges under Iowa Code § 476.11.

The CLEC Group points out that in the declaratory order the Board stated it did not have jurisdiction over the access charges of non-rate regulated local exchange carriers under either Iowa Code §§ 476.3 or 476.11 if those local exchange carriers qualified for exemption under Iowa Code § 476.1. In this proceeding, the CLEC Group argues there is no regulatory distinction among non-rate regulated local exchange carriers and CLECs because Iowa Code § 476.1 does not make a distinction among various types of telephone companies. Thus, the CLEC Group

contends that CLECs access charges are expressly exempted from the Board's jurisdiction, as each CLEC has fewer than 15,000 customers and access lines.

On December 24, 2003, AT&T filed supplemental comments addressing the issues related to the Board's jurisdiction. AT&T asserts that the Board has jurisdiction over CLEC intrastate access rates pursuant to Iowa Code §§ 476.3, 476.8, 476.11, 476.29 and 476.101(1). Additionally, Iowa Code § 476.101(1) permits the Board to apply other provisions of Chapter 476 to CLECs with market power.

In the declaratory order, the Board held that in the absence of specific statutory authorization, it does not have general jurisdiction over the access charges of non-rate regulated local exchange carriers. Generally speaking, most CLECs in Iowa have fewer than 15,000 customers and access lines and are, therefore, non-rate-regulated local exchange carriers. Based upon this finding and these facts, the Board finds that it lacks jurisdiction to adopt the suggested revisions to subparagraph 22.14(2)"d"(1)"2" to generally require that all CLECs reduce their intrastate access charges.

In its decision in the FiberComm case, however, the Board found that § 476.101(1) gives it specific statutory authorization to regulate the intrastate access charges of CLECs that possess market power in the access service market. The Board further found that each CLEC has market power with respect to access to its own local exchange customers; this is particularly true of terminating access, but also applies to originating access. Strictly speaking, this finding only applies to the CLECs that were parties to the FiberComm case, but so far no CLEC has identified any

factual circumstances that would support a different conclusion. Thus, the new numbered paragraph will apply to all CLECs that voluntarily concur in the ITA access tariff.

By adopting the proposed amendment, the Board will extend the effect of its FiberComm decision to every CLEC that chooses to concur in the ITA access tariff. Currently, almost all CLECs concur in that tariff; if they continue to do so, then the result will be elimination of the CCLC from CLEC access charges in competitive exchanges. A CLEC that was not a party to the FiberComm case could file a separate access tariff of its own and try to continue to include the CCLC in its access rates, but any interexchange carrier (or other interested person) could then file an objection or a complaint seeking to have the FiberComm analysis extended to this CLEC. The burden would then be on the CLEC to show why it should not be subject to the same analysis.

22.14(2)"d"(1)

MCI suggested that the Board should revise subparagraph 22.14(2)"d"(1) to include a reference to numbered paragraphs "1" and "2" to ensure those local exchange carriers affected by the provisions of this subparagraph understand what requirements will apply to them. MCI proposes the following language:

> (1) Carrier common line charge. The rate for the intrastate carrier common line charge shall be three cents per access minute or fraction thereof for both originating and terminating segments of the communication, unless a different rate is required by subparagraph (a) or (b). The carrier common line charge shall be assessed to exchange access made by any interexchange telephone utility, including resale carriers.

> In lieu of this charge, interconnected private systems shall pay for access as provided in 22.14(1)"b."

The Board agrees that the changes will clarify the application of the rule and will adopt the proposed revision to subparagraph 22.14(2)"d"(1) suggested by MCI.

IT IS THEREFORE ORDERED:

1. The revised rules attached to and incorporated by reference in this order are adopted.

2. The Executive Secretary is directed to submit for publication in the Iowa Administrative Bulletin an "Adopted and Filed" notice in the form attached to and incorporated by reference in this order.

UTILITIES BOARD

/s/ Diane Munns

/s/ Mark O. Lambert

CONCURRENCE OF ELLIOTT G. SMITH
DOCKET NO. RMU-03-11

First of all, let me be clear that I fully agree with the decision reached in this order (RMU-03-11). I believe the Board is being consistent with In re: FiberComm L.L.C., et al., v. AT&T Corp. (FCU-00-3) in determining that the Iowa Code gives it specific statutory authorization in section 476.101(1) to regulate the intrastate access charges of Competitive Local Exchange Carriers (CLECs) that possess market power

in the access service market. I also feel that the language offered to clarify Iowa Code subparagraph 22.14(2)"d"(1) necessary and appropriate.

However, within the body of the analysis above is a reference to the Board's declaratory order delivered on October 18, 2002, for In re: Interstate 35 Telephone Company, d/b/a Interstate Communications and Southwest Telephone Exchange Inc., d/b/a Interstate Communications (DRU-02-4). There a majority of the Board held that in the absence of specific statutory authorization it does not have general jurisdiction over the access charges of non-rate regulated local exchange carriers. I authored a concurrence for that order which described how the rules of statutory construction create an ambiguity within chapter 476 of the Iowa Code as to whether the Board has been granted jurisdiction to review access fees for reasonableness. At the time I suggested the Iowa General Assembly might want to visit the issue to resolve this perceived conflict of legislative intent. With the decision we render today in Intrastate Access Service Charges (RMU-03-11), I will take the opportunity to refresh this suggestion.

As I noted in the original concurrence, my struggle with legislative intent in no way preordains any decision I might make on the substantive issues surrounding the propriety of access rates charged. My focus is purely on whether the Board has been legislated authority to, at the very least, bring such a matter to hearing.

This issue turns on interpretation of language within chapter 476 of the Code of Iowa. In DRU-02-4, the petitioner Interstate 35 Telephone Company, d/b/a Interstate Communications, and Southwest Telephone Exchange, Inc., d/b/a

Interstate Communications, along with interveners Rural Iowa Independent Telephone Association, Iowa Telecommunications Association, and a group of municipal CLECs argued that the Board has no ratemaking jurisdiction in relation to them pursuant to Iowa Code section 476.1. That section states, in part:

> Mutual telephone companies in which at least fifty percent of the users are owners, co-operative telephone corporations or associations, telephone companies having less than fifteen thousand access lines, municipally owned utilities, unincorporated villages which own their own distribution systems are not subject to the rate regulation provided for in this chapter. IC sec. 476.1 (2002)

Conversely, the Consumer Advocate and interveners AT&T Communications of the Midwest, Inc. (AT&T), Qwest Corporation, and WorldCom, Inc. stated their belief that Iowa Code section 476.11 gives the Board the necessary jurisdiction to resolve complaints brought to it by public utilities. This would include a review of access rates for reasonableness. The language in section 476.11 that I find ambiguous regarding the scope of the Board's jurisdiction resides in the second paragraph, which states:

> The board may resolve complaints, upon notice and hearing that a utility, *operating under section 476.29*, has failed to provide just, reasonable, and nondiscriminatory arrangements for interconnection of its telecommunications services with another telecommunications provider. IC sec. 476.11 (2002) *(emphasis added*)

Iowa Code sections 476.29(1) and (12) require the Board to issue "certificates of public convenience" for ***any*** utility wishing to provide land-line local telephone

service in Iowa, including municipals and cooperatives. A utility "must" have such a certificate in order to do business in the state. Otherwise, it will not be allowed to construct, install, or operate lines or equipment for the purpose of furnishing service.

Here is where the conflict arises and ambiguity weighs-in. The Iowa General Assembly passed Section 476.1 in 1963, exempting small telephone companies from rate regulation authority of the Board. However, the second paragraph of section 476.11 and all of section 476.29 were passed by the Iowa General Assembly in the 1990s, containing statutory language that has a 'notwithstanding' effect on the prohibition against Board review and regulation stated in 476.1. Through this later-in-time action, the Legislature appears to have effectively given the Board authority to resolve complaints lodged against the universe of telephone utilities that have been provided a certificate of public convenience to operate in the state.

Iowa Code section 4.8 gives precise direction when irreconcilable differences exist in statutory language. It states:

> If statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment by the general assembly prevails. If provisions of the same Act are irreconcilable, the provision listed last in the Act prevails. IC sec. 4.8 (2002)

I remain unsettled in my own mind as to whether sections 476.1, 476.11, and 476.29 are reconcilable. I still cannot automatically dismiss the argument presented by AT&T and its supporters in DRU-02-4 that the Iowa General Assembly has, in fact, given the Board rate regulation authority over municipal and cooperative telephone companies through the amendments it has made to chapter 476 over the last

12 years. By the same token, I am not yet inclined to automatically dismiss the policy of rate regulation exemption granted small telephone companies some 41 years ago. I remain firm in my belief that it is incumbent upon State lawmakers to lend clarity to this perceived conflict of legislative intent. The specific questions to consider are:

1. Pursuant to section 476.1, are telephone companies having fewer than 15,000 customers and fewer than 15,000 access lines *fully* exempt from rate review and regulation by the Board?

2. Pursuant to the second paragraph section 476.11, *may the Board resolve* duly noticed complaints against a utility, operating under section 476.29, alleging arrangements for interconnection of telecommunication services with another telecommunications provider that fail to be just, reasonable, and nondiscriminatory?

As I first said 17 months ago in DRU-02-4, once this ambiguity that resides in chapter 476 is resolved, the Board can act with confidence and without hesitation when it comes to questions of regulatory jurisdiction and authority over the telecommunications industry in Iowa.

With these concerns of mine duly revisited and noted again, I will respectfully concur with the attached order.

/s/ Elliott Smith

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

Dated at Des Moines, Iowa, this 18th day of March, 2004.

UTILITIES DIVISION [199]

Adopted and Filed

Pursuant to Iowa Code sections 17A.4, 474.5, 476.1, 476.2, and 476.4 (2003), on March 18, 2004, the Utilities Board (Board) issued an order in Docket No. RMU-03-11, In re: Intrastate Access Service Charges [199 IAC 22.14(2)"d"(1)], "Order Adopting Amendments." In the order, the Board adopted amendments to 199 IAC 22.14(2)"d"(1), the Board's rules relating to access charges. The Board proposed amendments to its access rules in a rule making commenced on July 18, 2003. The "Notice of Intended Action" was published in IAB Vol. XXVI, No.3 (8/6/03) p. 203, as ARC 2680B.

The Board proposed amendments to subparagraph 22.14(2)"d"(1) in two areas. First, the Board proposed to amend the rule to better reflect the current application of the Carrier Common Line charge (CCLC) by rate-regulated incumbent local exchange carriers (ILEC)s. Second, the Board proposed to require competitive local exchange carriers (CLECs) that choose to concur with the Iowa Telephone Association (ITA) Access Service Tariff No. 1 and that offer service in exchanges where the ILEC access rate is lower than the ITA access tariff rate to remove the three-cent CCLC rate element from their access tariffs. The second amendment adopts a provision that implements the Board's decision In re: FiberComm L.L.C., et al., v. AT&T Corp., Docket No. FCU-00-3.

A summary of the comments filed and the amendments adopted can be found in the Board's order located on the Board's Web site, www.state.ia/iub, or in hard copy in the Board's Record Center, 350 Maple Center, Des Moines, IA 50319. Based upon the comments, the Board determined that certain revisions should be made to the proposed amendments. These revisions do not substantively change the amendments and are within the scope of the July 18, 2003, notice.

These amendments are intended to implement Iowa Code sections 17A.4, 474.5, 476.1, 476.2, and 476.4.

These amendments will become effective May 19, 2004.

The following amendments are adopted.

Item 1. Amend paragraph **22.14(2)"d"** as follows:

d. All intrastate access tariffs shall ~~comply with~~ incorporate the following:

(1) Carrier common line charge. The rate for the intrastate carrier common line charge shall be three cents per access minute or fraction thereof for both originating and terminating segments of the communication, unless a different rate is required by numbered paragraphs "1" and "2." The carrier common line charge shall be assessed to exchange access made by any interexchange telephone utility, including resale carriers. In lieu of this charge, interconnected private systems shall pay for access as provided in 22.14(1)"b."

1. Rate-regulated local exchange utility intrastate access service tariffs shall include the carrier common line charges approved in the rate-regulated local exchange utility's price regulation plan or as otherwise approved by the board.

2. A competitive local exchange carrier that concurs with the Iowa Telephone Association access service tariff no. 1 and that offers service in exchanges where the incumbent local exchange carrier's intrastate access rate is lower than the ITA access rate shall deduct the carrier common line charge from its intrastate access service tariff.

(2) through (7) No change.

March 18, 2004

/s/ Diane Munns
Diane Munns
Chairman